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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

CARNIVAL CRUISE LINES, INC.,
Petitioner,

VS.

SUSAN MORTON AND WILLIAM MORTON,
Respondents.

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF THE INTERNATIONAL COUNCIL OF CRUISE LINES AS *AMICUS CURIAE*, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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MOTION BY THE INTERNATIONAL COUNCIL OF CRUISE LINES FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The International Council of Cruise Lines ("ICCL") respectfully moves this Court for leave to file the accompanying *Amicus Curiae* Brief in support of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. Petitioner has consented to leave for this purpose, but Respondents have not. Therefore, leave to file must be sought pursuant to Supreme Court Rule 37.2.

1. NATURE OF AMICUS' INTEREST

The ICCL is a domestic non-profit membership association of twenty passenger cruise lines whose members operate in excess of eighty vessels calling at numerous ports in the United States. Passenger cruises have become increasingly popular with the

American public, and represent a substantial and growing segment of the vacation and leisure-time market.[1] These cruise vessels embark and disembark passengers at major ports on the Atlantic, Gulf and Pacific Coasts, and repeatedly pass through waters of different jurisdictions during their voyages.

The Petition for Writ of Certiorari presents substantial and important questions concerning the legal standard of care owed by cruise lines to their passengers, and concerns all members of the ICCL. It is a matter of great practical concern to the cruise lines that the standard for imposing liability not differ depending upon which jurisdictional waters are being navigated. A uniform standard for determining liability is imperative.

2. RELEVANT MATTERS RAISED BY THIS AMICUS BRIEF WHICH MAY NOT BE ADDRESSED BY THE PARTIES.

The ICCL believes there are important considerations of national uniformity of the maritime law raised by the Petition for Writ of Certiorari which directly impact the passenger cruise industry in the United States. In its decision below the Ninth Circuit held that a cruise line is absolutely liable to a passenger for a crew member's intentional tort even though it was committed outside the course and scope of employment. The ICCL fully supports Petitioner's reasons for granting the Writ of Certiorari on whether that ruling is correct. As Petitioner asserts, the Ninth Circuit's decision is a significant departure from the established application of this Court's doctrine of respondeat superior liability in the maritime law. *New Jersey Steamboat Co. v. Brockett,* 121 U.S. 637 (1887).

The Brief that this *Amicus* seeks leave to file addresses the further question raised by Petitioner — whether, in the absence of respondeat superior liability, the court below erred in imposing a

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[1]Statistics compiled by the Cruise Lines International Association indicate more than 4 million passengers embarked on cruises in North America during 1992. This represents a significant increase from 1.4 million passengers in 1980. It is estimated that by the year 2000 over 8 million passengers will embark on such cruises.

strict liability standard on cruise lines, rather than a negligence standard of reasonable care under the circumstances. The ICCL's Brief presents the cruise industry's perspective in seeking resolution of this question. The issue is one of great practical concern to the cruise line members who, at least since this Court's decision in *Kermarec v. Compagnie Generale Transatlantique,* 358 U.S. 625 (1959), have been guided by the principle that their liability to passengers is governed by the practical standard of reasonable care under the circumstances.

The ICCL believes that the decision below is contrary to the principle established in *Kermarec* that a vessel owner may be liable to an injured passenger for its negligence but is not liable without fault. The rule of *Kermarec* has proven over time to be flexible with its contours being refined on a case-by-case basis by the lower federal courts. Each member of the ICCL owns or operates cruise vessels traversing the waters of multiple federal jurisdictions and has an immediate, substantial interest in establishing uniformity on this fundamental issue under the maritime law.

Respectfully submitted,

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BRIEF OF THE INTERNATIONAL COUNCIL OF CRUISE LINES AS *AMICUS CURIAE*, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

The Ninth Circuit's decision below held a cruise line to a standard of strict liability for an intentional tort committed against a passenger by a crew member outside the course and scope of employment, and declined to apply the legal standard of reasonable care under the circumstances established by this Court's prior decisions. See *Leathers v. Blessing*, 105 U.S. (15 Otto) 626 (1882); *The Admiral Peoples*, 295 U.S. 649 (1935); *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959).

Except for liability arising from application of the doctrine of respondeat superior, it is well established in the maritime law that a cruise line is not liable to an injured passenger without a finding of negligence. The only class of injured persons entitled to recover from a shipowner on principles of liability without fault are

seamen who are granted the absolute right to a seaworthy ship. *The OSCEOLA*, 189 U.S. 158 (1903); *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946). In *Kermarec*, this Court recognized that seamen, by virtue of the hazards and risks of their work, were distinctly different from passengers, licensees or invitees who were all owed a single, unified duty of reasonable care. 358 U.S. at 630 n. 9.

The rule of *Kermarec* has proven practical, and its more precise contours have been shaped and refined in maritime passenger cases by the federal courts. As it has evolved, the rule allows courts to tailor the degree of care required as reasonable to match the extent to which the maritime circumstances of the risk differ from those encountered in daily shoreside life. *Rainey v. Paquet Cruises, Inc.*, 709 F. 2d 169 (2d Cir. 1983).

The decision below conflicts in principle with the rule of *Kermarec*, and its progeny, in imposing strict liability on a shipowner for injury to a passenger. The conflict will cause confusion in the federal courts, and is a matter of great practical concern to the passenger cruise industry. This Court should grant the Writ of Certiorari to correct this conflict and ensure national uniformity on this fundamental aspect of maritime law.

REASONS FOR GRANTING WRIT OF CERTIORARI

I. THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO CORRECT THE DECISION BELOW WHICH CONFLICTS IN PRINCIPLE WITH ITS EARLIER DECISION IN *KERMAREC*.

The decision below arises out of an alleged assault to a passenger on board a cruise line vessel, and is therefore governed by the federal maritime law, not by the law of the states. *Leathers v. Blessing*, 105 U.S. (15 Otto) 626 (1882); *Romero v. International Terminal Operating Co.*, 358 U.S. 354, *rehearing denied* 359 U.S. 962 (1959). The national interest in promoting the uniformity of the maritime law was originally set forth in *The LOTTAWANNA*, 88 U.S. (21 Wall.) 558 (1874), and is based on Article III, Section 2 of the United States Constitution,

extending the judicial power of the United States to "all cases of admiralty and maritime jurisdiction".

The nature of maritime commerce requires that the substantive laws regulating the rights and responsibilities of shipowners and their passengers not vary according to the jurisdiction in which vessels operate. The paramount importance of establishing and maintaining uniformity of the maritime law has repeatedly been endorsed by this Court. See e.g. *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942); *Romero v. International Terminal Operating Co.*; *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 401-402 (1970).

The member cruise lines of the ICCL all operate vessels which navigate in the waters of different federal jurisdictions. They carry passengers to and from United States seaports. In the event of injury to passengers, the cruise lines are subject to claims and suits under the maritime law in different jurisdictions. The standard for determining their legal liability for injuries is of great importance and concern to the cruise lines.

In its decision below, the Ninth Circuit adopted a standard imposing absolute, or strict, liability on the cruise line to a passenger for an employee's intentional tort committed outside the course and scope of employment. In so ruling, the Ninth Circuit declined to follow the standard of reasonable care most recently expressed by this Court in *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959), as the singular and uniform duty owed by a shipowner to all non-seamen personnel aboard the vessel. The Ninth Circuit adopted a different standard, one of absolute liability, on the grounds that this was a "meaningful category" of cases exempt from the rule of *Kermarec*. (See Appendix to Petition at 7a).

In exempting this case from the reasonable care standard, the Ninth Circuit relied on this Court's comment in *Kermarec*, which acknowledged the well-established exception to a vessel's duty of reasonable care in the case of seamen who are owed the absolute warranty of seaworthiness. 358 U.S. at 632 n.9. The Ninth Circuit held that this express exception recognized for seamen allowed a

further, implicit exception to the general rule for passengers injured by the intentional tort of a crew member. This exception is not supported by the decisions of this Court and is not warranted. Except for a shipowner's vicarious liability arising under the doctrine of respondeat superior, cruise lines have historically been held liable for a passenger's injury based on proven negligence.

The decision below, therefore, conflicts with the principle of *Kermarec*. It imposes absolute liability on a shipowner for a class of persons who heretofore have always been held to be owed the practical and uniform duty of reasonable care under the circumstances.

Passengers have never been owed the duty of a "seaworthy" vessel, the breach of which gives rise to absolute liability.[1] See *The OSCEOLA*, 189 U.S. 158 (1903); *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946). The corollary to this rule is that a cruise line is not an absolute insurer of the safety of its passengers. *City of Panama*, 101 U.S. 453, 462 (1879). This Court's opinion in *Kermarec*, expressly recognized that the plaintiff-guest was neither a member of the ship's crew, nor of the expanded class of workmen performing work traditionally done by the crew, both of whom were entitled to the benefit of the unseaworthiness doctrine. 358 U.S. at 629.[2] Seamen are owed the absolute duty of a seaworthy vessel because of their historical status as wards of admiralty and the hazards of their employment. See *Mahnich v.*

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[1] The doctrine of seaworthiness in maritime personal injury law is a term of art respecting a shipowner's legal duty, and must be distinguished from the ordinary meaning of the word, namely, whether a vessel is generally fit to travel in on the open sea. Webster's New World Dictionary, Third College Edition, at 1211 (1991).

[2] The unseaworthiness remedy that was judicially extended to longshoremen when performing work traditionally done by seamen was abrogated by Congress in the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act. See 33 U.S.C. § 905(b).

Southern S.S. Co., 321 U.S. 96, 103-104 (1944); *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 93-94 (1946).[3]

The principle teaching of *Kermarec* extended the duty of reasonable care to all non-seamen, and eliminated any distinctions in that duty based on status as guest, licensee or invitee. The legal effect of the decision below is to impose liability on a cruise line operator for a passenger's injury as if the passenger were a seaman owed the absolute warranty of seaworthiness. This is contrary to the general maritime law as developed by this Court's decisions.

The exception from the rule of *Kermarec* expressed in the decision below upsets the body of maritime law carefully developed by the federal courts following *Kermarec*. Although subsequent decisions often entertained semantic descriptions of the *Kermarec*-duty as the "highest degree of care", "very high degree of care", or "extraordinary vigilence", there is, in essence, only one degree of care owed to passengers: "reasonable care under the circumstances".[4] The nature of that duty was more precisely defined by the Second Circuit Court of Appeals in *Rainey v. Paquet Cruises, Inc.*, 709 F. 2d 169 (2d Cir. 1983) in which it was held that the degree of care required of the cruise line as reasonable must take into account the maritime circumstances of the risk and whether that risk differs from those encountered in daily shoreside life.[5] The rule of *Kermarec*, as applied and refined

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[3]For a succinct discussion of the historical development of unseaworthiness liability and its complete divorcement from negligence concepts, see *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 543-550 (1960).

[4]See e.g. *Moore-McCormack Lines v. Russak*, 266 F. 2d 573 (9 Cir. 1959); *Maibrunn v. Hamburg-American SS Co.*, 77 F. 2d 304 (2 Cir. 1935); *Allen v. Matson Navigation Co.*, 255 F. 2d 273 (9 Cir. 1958).

[5]The holding in *Rainey* has been followed by other Circuit Courts of Appeal in numerous decisions. See e.g. *Muratore v. M/S SCOTIA PRINCE*, 845 F. 2d 347 (1 Cir. 1988); *Smith v. Southern Gulf Marine Co. No. 2, Inc.*, 791 F. 2d 416 (5 Cir. 1986); *Beard v. Norwegian Caribbean Lines*, 900 F. 2d 71 (6 Cir. 1990); *Orian v. Milstead*, 473 F. 2d 948 (8 Cir. 1973); *Keefe v. Bahama Cruise Line, Inc.*, 867 F. 2d 1318 (11 Cir. 1989).

by the lower federal courts, has produced a practical and uniform standard to measure cruise line liability to passengers. The decision below conflicts with the principles of *Kermarec* and a well-established body of maritime law. For this reason, this Court should grant the Writ of Certiorari and correct the decision below.

II. THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO ESTABLISH UNIFORMITY UNDER THE MARITIME LAW ON THE IMPORTANT QUESTION OF THE STANDARD OF LIABILITY OF CRUISE LINES TO PASSENGERS.

At least since 1959, when this Court established the rule of *Kermarec*, cruise lines have been guided by a practical and uniform standard of liability to all non-seamen defined as the duty of reasonable care under the circumstances. The decision below departs from this uniform standard and has caused consternation among the member cruise lines of this *Amicus*. This concern is both academic and practical. In theory, this absolute liability will apply only to the Ninth Circuit, while the reasonable care standard will apply in the other circuits. Since the members' cruise vessels embark passengers at various ports in the United States and engage in voyages touching numerous jurisdictions, the cruise lines are, as a practical matter, subject to disparate liability standards. The confusion and uncertainty created by the decision below justifies granting the Writ of Certiorari in order to establish a national uniform standard for cruise line liability to passengers.

CONCLUSION

The International Council of Cruise Lines respectfully urges the Court to grant the Petition for Writ of Certiorari to correct the decision below, which conflicts in principle with the precedents established by this Court, and establish a uniform rule of maritime law.

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